RECORD AND BRIEFS

Supreme Court, U.S.
FILED
NOV 22 2011
OFFICE OF THE CLERK

No. 11-347

In the Supreme Court of the United States

GEORGIA-PACIFIC WEST, INC., HAMPTON TREE FARMS, INC., STIMSON LUMBER CO., SWANSON GROUP, INC., AMERICAN FOREST & PAPER ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, & TILLAMOOK COUNTY,
Petitioners,

v.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

PER A. RAMFJORD
LEONARD J. FELDMAN
JASON T. MORGAN
Stoel Rives LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
(503) 224-3380

TIMOTHY S. BISHOP
Counsel of Record
RICHARD BULGER
CHAD CLAMAGE
FRANK M. DICKERSON
Mayer Brown LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600
tbishop@mayerbrown.com

Additional counsel listed on signature page

Library of Congress

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii
REPLY BRIEF 1
CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Association to Protect Hammersley, Eld & Totten Inlets v. *Taylor Resources, Inc.*, 299 F.3d 1007 (9th Cir. 2002) 11

Auer v. *Robbins*, 519 U.S. 452 (1997) 1, 11

Chemical Mfrs. Ass'n v. *Natural Res. Def. Council*, 470 U.S. 116 (1985) 7

Chevron U.S.A., Inc. v. *Natural Res. Def. Council*, 467 U.S. 837 (1984) 1, 11

Conservation Law Foundation v. *Hannaford Bros. Co.*, 327 F. Supp. 2d 325 (D. Vt. 2004), aff'd, 139 F. App'x 3381 (2d Cir. 2005) 10, 11

Environmental Defense Center v. *EPA*, 344 F.3d 832 (9th Cir. 2003) 11

Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 8

F. Hoffmann-La Roche, Inc. v. *Empagran S.A.*, 542 U.S. 155 (2004) 8

Fishermen Against the Destruction of the Environment v. *Closter Farms*, 300 F.3d 1294 (11th Cir. 2002) 11

Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) 9

TABLE OF AUTHORITIES—continued

Page(s)

Natural Res. Def. Council v. *Train*, 396 F. Supp. 1393 (D.D.C. 1975), aff'd *sub nom.* *Natural Res. Def. Council* v. *Costle*, 568 F.2d 1369 (D.C. Cir. 1977) 1

Newton County Wildlife Association v. *Rogers*, 141 F.3d 803 (8th Cir. 1998) 10

Santa Fe Indus. v. *Green*, 430 U.S. 462 (1977) 8

STATUTORY AND REGULATORY MATERIALS

33 U.S.C. § 1288 6

33 U.S.C. § 1314 6

33 U.S.C. § 1342 4

33 U.S.C. § 1362 ..... 6, 9

40 C.F.R. § 122.26 ..... *passim*

40 C.F.R. § 122.27 ..... *passim*

40 Fed. Reg. 56932 (Dec. 5, 1975) 6

41 Fed. Reg. 6281 (Feb. 12, 1976) 7

41 Fed. Reg. 24709 (June 18, 1976) 1, 7

55 Fed. Reg. 20521 (May 17, 1990) 7

TABLE OF AUTHORITIES—continued

Page(s)

MISCELLANEOUS

EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program* (Mar. 1995) 5

E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP, & E. HARTNETT, SUPREME COURT PRACTICE (9th ed. 2007) 8, 9

The Ninth Circuit jettisoned 35 years of consistent EPA interpretation and practice when it held, reversing the district court, that NPDES permits are required for channeled precipitation runoff from forest roads. Our petition demonstrated that, under *Chevron* and *Auer*, the court of appeals should have deferred to EPA's interpretation of the Clean Water Act and of its own regulations, and to EPA's conclusion that channeled silvicultural runoff is "better controlled through the utilization of best management practices" (41 Fed. Reg. at 24710) and "ill-suited for inclusion in a permit program" requiring end-of-pipe effluent limitations designed for industrial polluters. *Train*, 396 F. Supp. at 1395. We showed too that it was improper for the Ninth Circuit to substitute its own view of what "associated with industrial activity" means for the considered views of the expert agency charged by Congress with implementing the Act. And we explained that these factors—coupled with disarray among the courts of appeals and the Ninth Circuit's erroneous imposition of a hugely burdensome permitting regime that will destroy jobs, bury regulators and industry in costly permit applications and litigation, and affirmatively harm the environment—easily satisfy Rule 10's criteria for certiorari.

1. In response, NEDC blithely asserts (at 1, 34-35) that this case involves "narrow regulatory issues" giving rise to "hypothetical regulatory burdens" of no "great practical importance." But the regulators and regulated have documented the facts—in amicus filings not mentioned, let alone answered, by respondent—and those facts confirm the need for this Court's immediate intervention.

In addition to Oregon, which has separately petitioned in No. 11-338, no fewer than 26 additional States have explained that the Ninth Circuit's erroneous ruling "raises an issue of exceptional importance warranting review because of the impact it will have on existing State [best management practice] programs." Br. of Arkansas, *et al.*, at 12. Subject to "EPA oversight and approval," these States regulate "forestry practices" with "the most comprehensive program of BMPs of any land use activity in the nation"—developed at the cost of "thousands of hours and millions of dollars" and carefully "adapted to local conditions and circumstances." *Id.* at 12, 14-15. Under the court of appeals' incorrect decision, these "BMP programs will be jettisoned," and a "blizzard" of permit applications will cause "tumult at the state level," "far outstripping" the resources available to state regulators. *Id.* at 15-16. And these 26 States have explained that with courts elsewhere following EPA's interpretation, they now face "a patchwork of uneven regulation," as well as the prospect of litigation as "environmental groups" seek "to extend the reach of the Ninth Circuit's decision." *Id.* at 20-21.

Explaining that many forest roads are owned by counties and other local government entities, the National Association of Counties shows in its amicus brief how the "drastic shift in the manner in which the CWA is implemented," mandated by the Ninth Circuit, will "inundat[e]" local governments with an "enormous workload" to obtain permits for ditches with "insignificant environmental impacts." Br. of Nat'l Ass'n of Counties, *et al.*, at 13. In Oregon alone, 4,800 miles of county roads serving forests include 20,000 cross culverts. *Id.* at 14. By analyzing current permit requirements for discharges associated with

industrial activity, the Association demonstrates the "staggering financial burden"—$56 million to Oregon counties alone, even before monitoring costs—of substituting NPDES permitting for best management practices. *Id.* at 15-18. And it shows how a "checkerboard" of county, state, BLM, U.S. Forest Service, and private rights over the vast "interconnecting system" of forest roads—"simply miscomprehended" by the Ninth Circuit—make the court of appeals' "entirely new interpretation of the CWA" utterly impractical in its "complexity." *Id.* at 19-20.

The American Forest Resource Council, Public Lands Council, National Cattlemen's Beef Association, and others dependent upon hundreds of thousands of miles of *federally* managed forest roads —including ranchers who use those roads to haul livestock—also urge this Court to grant certiorari. Their brief documents both the massive burden of permitting U.S. Forest Service roads (400,000 permits by the Forest Service's own estimate), and the certainty that the Ninth Circuit's faulty ruling will lead to costly litigation (as shown by the 60-day notice of suit that has already been filed against the Forest Service in Idaho, and a plethora of administrative protests based on the lack of NPDES permits). Br. of the Am. Forest Res. Council, *et al.*, at 9-12 & App. 1a, 10a.

Forestry associations from every corner of the Nation document the vast magnitude of the additional permitting burden imposed on forest road users and regulators by the Ninth Circuit—a burden that falls on top of the 411,500 NPDES permits that EPA's Office of Water and state permitting authorities already process, for which there is a $1 billion-plus funding shortfall. Br. of Alabama Forestry

Ass'n, *et al.*, at 13-22 & App. A8-A9; Br. of Nat'l Alliance of Forest Owners, *et al.*, at 2-3.

EPA thought this case important enough to file amicus briefs in both courts below, arguing strongly against the position adopted by the court of appeals and stating that subjecting forestry roads to NPDES permitting "would have significant implications" for the agency. See Pet. 22. Respondent's bare assertion that the Ninth Circuit's radical expansion of the NPDES program—and rejection of EPA's long-held interpretation—is not important enough to review defies common sense.

2. NEDC devotes most of its brief to asserting that the Ninth Circuit correctly interpreted the statutory and regulatory scheme. Its argument rests on the proposition that EPA's Phase I stormwater regulation, adopted in response to 1987 amendments to the CWA, "requires permits for point-source stormwater discharges associated with the logging industry," and that forest road runoff fits that definition. See Opp. i, 9, citing 40 C.F.R. § 122.26(b)(14)(ii) (which refers to SIC 24); 33 U.S.C. § 1342(p)(2)(B). That argument is incorrect.

What the Phase I regulation actually provides is that a permit is required for a point source discharge "that is *directly related* to manufacturing, processing or raw materials storage areas *at an industrial plant*," including "*immediate access roads*," and does not include "discharges *from facilities or activities excluded from the NPDES program under this part 122*" (emphasis added). As the United States explained below, this language does not apply to forest road runoff—whether or not it runs "through ditches [and] culverts"—for multiple reasons. Pet. App. 114a; Pet. 20-21.

First, the United States explained, EPA's Phase I regulation specifies that no permit is required for activities that are defined as nonpoint source by the Silvicultural Rule, 40 C.F.R. § 122.27. EPA has always interpreted "natural runoff" and similar terms in the Silvicultural Rule that designate nonpoint sources to include all forest road "'runoff from precipitation events,'" channeled or not. Pet. App. 113a-114a, 125a-126a.

Second, EPA has stated, "forestry roads" are "not 'directly related' to activities associated with an 'industrial plant' under any plain language meaning of the regulation," which applies to "sawmills, planing mills, and other mills" engaged in industrial production. Pet. App. 124a.

Third, contrary to NEDC's contention that SIC Code 24 encompasses forestry roads, the United States explained that forestry roads "inherently" have a broad range of uses including recreation, fire prevention, reforestation, maintenance of timber tracts, and forestry services, and "best fit within SIC Code 8," which is not covered by the Phase I regulations. Pet. App. 123a-125a. EPA was certainly entitled to reach that conclusion and to report to Congress that NPDES requirements do not apply to "runoff from agricultural and silvicultural activities (mostly within SIC codes 01-09)." Pet. App. 126a, quoting EPA, *Storm Water Discharges Potentially Addressed by Phase II of the NPDES Storm Water Program* (Mar. 1995). The Ninth Circuit should have deferred to EPA's interpretation of the Phase I amendments and regulations. See Pet. 16-17, 22-24.

3. NEDC's claim that the Ninth Circuit's ruling is consistent with the text of the Silvicultural Rule fares no better. The rule defines the term "silvi-

cultural point source": it "*means*" "any discernible, confined and discrete conveyance related to rock crushing, gravel washing, log sorting, or log storage facilities" and *does not include* "surface drainage, or road construction and maintenance from which there is natural runoff." 40 C.F.R. § 122.27(b). Were respondent correct that the rule only "clarifies that *nonpoint*-source activities that generate natural runoff are excluded" (Opp. 11) the rule would be entirely unnecessary ("nonpoint sources are nonpoint sources").

Furthermore, that is not how EPA has ever read the rule. The "intent of EPA in adopting the Rule," the Ninth Circuit acknowledged, was to exclude runoff from the "listed activities from the definition of point source, irrespective of whether" it "is collected, channeled, and discharged." Pet. App. 32a. There is ample statutory authority for the rule as thus interpreted. See 33 U.S.C. § 1362(14) (the "term 'point source'" does "not include agricultural stormwater discharges"); *id.* § 1314(f)(A) ("nonpoint sources of pollutants" include "silvicultural activities" such as "runoff" from "forest lands"); *id.*, § 1288(b)(2)(F) (requiring EPA to assist states to develop "procedures and methods," including "land use requirements," to control "silviculturally related non-point sources of pollution").

Accordingly, EPA has repeatedly stated for more than 35 years that forest road precipitation runoff does not become a point source when it is channeled. 40 Fed. Reg. 56932 (Dec. 5, 1975) ("whether or not the rainfall happens to collect"—as "silvicultural runoff * * * frequently flows into ditches"—it is "properly regulated [as] nonpoint in nature and should not be covered by the NPDES permit

program"); 41 Fed. Reg. 6282 (Feb. 12, 1976) ("ditches, pipes and drains that serve only to channel, direct and convey non-point runoff from precipitation are not meant to be subject to the § 402 permit program"); 55 Fed. Reg. 20521, 20522 (May 17, 1990) (runoff from forest roads, "although sometimes channeled," remains "non-point source in nature"); Pet. App. 86a & n.4 (EPA Br., Nov. 17, 2003) (Silvicultural Rule excludes runoff from silvicultural activities "regardless of whether they" discharge through "'conduits and channels'"); U.S. Brief to Ninth Cir., at 25 (Dec. 6, 2006) ("EPA has made it clear that the term 'natural runoff' in the silvicultural rule categorically excludes all stormwater runoff from forest roads, even where the roads include channels, ditches, or culverts").

EPA has explained why it takes this position: pollutants in forest road runoff are "induced by natural processes, including precipitation," are "not traceable to any discrete and identifiable facility," and are "better controlled through the utilization of best management practices." Pet. App. 21a, quoting 41 Fed. Reg. 24710 (June 18, 1976); see also 55 Fed. Reg. at 20522 (point source treatment of "channeled" runoff is inappropriate because it is caused by "natural processes," "not otherwise traceable to any single identifiable source," and "best treated by non-point source controls"); Pet. App. 114a ("ditches" and "culverts" are "an integral part of forest roads," which would "wash out" without them). That is "a sufficiently rational" explanation for EPA's approach "to preclude a court from substituting its judgment for that of EPA." *Chemical Mfrs.*, 470 U.S. at 125.

Respondent cites not a single instance in which EPA has required a permit for channeled forest road

runoff. NEDC's argument that EPA must do so depends on ignoring the text of the regulation, numerous interpretative and explanatory statements in the regulatory record, decades of consistent agency practice, and the decisions of this Court, which establish that deference is required to EPA's expert judgment.

4. NEDC wrongly contends (at 1) that certiorari is inappropriate because the Ninth Circuit made a "non-final ruling that sustains a complaint under Rule 12(b)(6)." This Court frequently grants certiorari in cases where the opinion below resolved an important issue, otherwise worthy of review, and a decision would hasten or finally resolve the litigation. See, *e.g.*, *F. Hoffmann-La Roche, Inc.* v. *Empagran S.A.*, 542 U.S. 155 (2004); *Santa Fe Indus.* v. *Green*, 430 U.S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); E. GRESSMAN ET AL., SUPREME COURT PRACTICE 282 (9th ed. 2007).

The Ninth Circuit squarely held that "stormwater runoff from logging roads that is collected by and then discharged from a system of ditches, culverts, and channels is a point source discharge for which an NPDES permit is required." Pet. App. 47a. Whether that ruling is erroneous is a purely legal question that can efficiently be resolved by this Court. Because reversal of that ruling would end this litigation, the question presented is appropriate for review. NEDC's assertion that petitioners' concerns can be addressed in the district court on remand or at the NPDES permitting stage misses the point: petitioners should not be subject to a permitting requirement, or be required to litigate in district court about such issues as who among the owners and many users of roads is responsible for obtaining

permits. The Ninth Circuit's decision is a final one on an important legal question that determines whether this litigation continues, and whether a massive new permitting regime is set in motion. It is ripe for this Court's review.

5. NEDC contends (at 33) that petitioners have waived the argument that the Clean Water Act's definition of "point source" to exclude "agricultural stormwater discharges" encompasses silvicultural stormwater discharges. 33 U.S.C. § 1362(14). That argument is besides the point, because EPA's reading of the statute is reasonable regardless of whether the agricultural stormwater provision applies. It is also incorrect. The Ninth Circuit analyzed the agricultural stormwater provision, and found that it did not support EPA's position that forest road runoff is nonpoint source. Pet. App. 14a-16a, 44a. Because the Ninth Circuit ruled on this issue, it is appropriate for review. See E. GRESSMAN ET AL., SUPREME COURT PRACTICE at 464-465; *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

NEDC cannot deny that silviculture is a form of agriculture. See Pet. 17; U.S. Br., Pet. App. 124a n.19 ("Forestry roads and silvicultural harvesting more closely resemble agricultural land uses than industrial ones"). And Congress specifically mentions silviculture along with agriculture in Sections 1288(b)(2)(F) and 1314(f)(2)(A). There is no reason to think that Congress omitted this very important area of agriculture from the scope of Section 1362(14).

6. NEDC cannot make the conflicts between the Ninth and other circuits disappear. Opp. 15-19. The

Eighth Circuit reached precisely the opposite result in *Newton County Wildlife*, where, like here, environmental groups argued that the Silvicultural Rule must be interpreted to require NPDES permits for discharges from "logging-road stream crossings" and "culverts." Br. of Appellants, No. 97-1852 (8th Cir. filed July 9, 1997), at 41-43. The Eighth Circuit held that argument to be "without merit" under its (correct) reading of the Silvicultural Rule. 141 F.3d at 810. Thus the issue was cleanly presented and decided. That Judge Loken's opinion disposes of it in short order reflects the weakness of the argument that 35 years of consistent interpretation and practice by the expert agency should be overridden—not any lack of care on the Eighth Circuit's part.

Contrary to NEDC's assertion (at 17) that the *Newton* court did not consider "discharges," the opinion explicitly addresses "discharges of pollutants that will accompany logging and road construction." 141 F.3d at 810. It is irrelevant that the Eighth Circuit did not consider EPA's Phase I regulations. Opp. 17. Those regulations expressly exempt from permitting all "discharges" that are "excluded from the NPDES program" under the Silvicultural Rule—and the Eighth Circuit held the Silvicultural Rule defines channeled forest road runoff as a nonpoint source not subject to permitting. Under *Newton*, the Eighth Circuit would have ruled for petitioners in this case.

In *Conservation Law Foundation*, 327 F. Supp. 2d 325, aff'd, 139 F. App'x 3381, the Second Circuit summarily affirmed the district court's ruling that permits were not required for channeled stormwater discharges from a commercial property that were not covered by Phase I or Phase II regulations. NEDC's

response (at 18) that EPA's Phase I regulations do require permits for channeled forest road runoff begs the question. EPA has repeatedly "confirmed that forestry roads are not covered by the phase I regulations." U.S. Br., Pet. App. 126a. In *CLF* the court recognized that Congress "grant[ed] EPA discretion to determine that certain stormwater discharges require regulation while others do not." 327 F. Supp. 2d at 330. The *CLF* court would have upheld EPA's exercise of discretion here.

Respondent also misses the point with *Closter Farms*, 300 F.3d 1294. The Eleventh Circuit squarely held that defendants did not lose the benefit of the agricultural stormwater provision because the stormwater was channeled rather than discharging to navigable waters as sheet flow. *Id.* at 1297. Likewise, collection in ditches and culverts does not change the nature of forest road runoff, as EPA has explained. *E.g.*, Pet. App. 113a-114a.

NEDC makes no attempt to explain how it was logical for the Ninth Circuit to hold here that forest road runoff is subject to Phase I permitting, yet to have remanded in *Environmental Defense Center*, 344 F.3d at 862, for EPA to explain its decision not to regulate that runoff under Phase II—a remand that would have been unnecessary if Phase I required permits. See also *Association to Protect Hammersley*, 299 F.3d at 1018-1019 (holding EPA has "power under the Act to define point sources" and refusing to "undermine the agency's interpretation").

These conflicts, the conflict with *Chevron*, *Auer*, and other decisions of this Court requiring deference to federal agency interpretations, and the importance

of the question presented all call for immediate review.[1] Because the views of the federal government have been set forth extensively in regulatory material and briefs for many years, there is no need to call for the views of the Solicitor General before granting certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PER A. RAMFJORD
LEONARD J. FELDMAN
JASON T. MORGAN
Stoel Rives LLP
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
(503) 224-3380

WILLIAM K. SARGENT
Tillamook County Counsel
1134 Main Avenue
Tillamook, OR 97141
(503) 842-4921

TIMOTHY S. BISHOP
Counsel of Record
RICHARD BULGER
CHAD CLAMAGE
FRANK M. DICKERSON
Mayer Brown LLP
71 South Wacker Dr.
Chicago, IL 60606
(312) 782-0600
tbishop@mayerbrown.com

NOVEMBER 2011

---

[1] As argued in our petition and elaborated in the petition and reply in No. 11-338 and the amicus brief of NAFO, the Ninth Circuit erred in exercising citizen-suit jurisdiction, an important issue that also warrants this Court's review.